In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-85

J. L. SMALLING, SUPERINTENDENT OF UNIFIED SCHOOL DISTRICT NO. 480, SEWARD COUNTY, KANSAS, and JO ANN SHARP, AL SHANK, DON AVEY, ROBERT CARLILE, GEORGE ROSEL, WAYNE ROSS and W. L. SEBRING, MEMBERS OF THE BOARD OF EDUCATION OF UNIFIED SCHOOL DISTRICT NO. 480, SEWARD COUNTY, KANSAS,

Petitioners,

vs.

LILA EPPERSON and OLETA A. PETERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The petitioners, J. L. Smalling, Superintendent of Unified School District No. 480, Seward County, Kansas, and Jo Ann Sharp, Al Shank, Don Avey, Robert Carlile, George Rosel, Wayne Ross and W. L. Sebring, members of the Board of Education of Unified School District No. 480, Seward County, Kansas, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 18, 1977.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Tenth Circuit is reported at 551 F.2d 254 (1977) and appears as Appendix A hereto. The opinion of the United States District Court for the District of Kansas, not reported, appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 18, 1977. A timely petition for rehearing was denied on April 19, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States authorize by implication an action for damages by teachers of a local public school district for alleged deprivation of an expectancy of continued employment without an administrative hearing prior to non-renewal of their contracts by the district's board of education?

2. If such cause of action exists, do the limitations upon comparable actions expressly authorized by 42 U.S.C. § 1983 apply so as to preclude suit against local school board members acting in their official capacities or so as to permit them to establish defenses available when sued personally?

3. Did the Court of Appeals properly direct a further trial as to damages recoverable by respondents under the

Fourteenth Amendment for deprivation of a pre-termination hearing when no appeal was taken from the jury's verdict determining, pursuant to 42 U.S.C. § 1983, that petitioners had established by a preponderance of evidence that respondents' contracts were not renewed because of budgetary considerations, and when no appeal was taken from the trial judge's determination, thereafter, that petitioners, by not affording a hearing, did not act arbitrarily or capriciously, or for constitutionally impermissible reasons?

4. In the absence of a cross-appeal, does a trial court's *dictum* as to the existence of an expectancy of continued employment under state law become the law of the case on appeal so as to preclude the parties prevailing at trial from upholding the judgment on grounds contrary to such *dictum*?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 1 and 5 of the Fourteenth Amendment, United States Constitution are set forth in Appendix C hereto (App. C, p. A38); as are 28 U.S.C. § 1331(a) (App. C, p. A38); 42 U.S.C. § 1983 (App. C, p. A39); 28 U.S.C. § 1343 (3) (App. C, p. A39); and Kansas Statutes Annotated, 72-5411 and 5412 (App. C, pp. A39, A40).

STATEMENT OF THE CASE

Respondents, Lila Epperson and Oleta A. Peters, were employed as teachers by Unified School District No. 480, Seward County, Kansas under written one-year contracts for the 1971-1972 school year. (R. 53). Their contracts were authorized by Kansas statutes then providing for automatic

year-to-year renewal unless either party gave timely notice of non-renewal, and further providing that even renewed contracts remained subject to cancellation for budgetary reasons. K.S.A. 72-5411, 5412. (App. C, pp. A39, A40).

Anticipating a decline in student enrollment for the ensuing year with an attendant decrease in state funds, respondent school board members in February, 1972, decided to reduce the staff for the next school year. Upon the recommendations of petitioner school superintendent, J. L. Smalling, timely notices of contract non-renewals were sent to respondents and other teachers employed by the district. (R. 53, 561). Respondents demanded a hearing before the board, claiming only that their contracts entitled them to such. (R. 72). Upon advice of counsel, petitioners refused to grant the hearing and, while respondents were still employed, petitioners filed a declaratory judgment suit in the District Court of Seward County, Kansas, seeking a determination of their contractual and state law obligations to respondents. (R. 561, 564).

Respondent teachers removed the declaratory judgment suit to the United States District Court, District of Kansas, and simultaneously filed with that Court separate civil rights actions initially lodged under 42 U.S.C. § 1981 and § 1983, with jurisdiction predicated on 28 U.S.C. § 1343, and later amended to include 28 U.S.C. § 1331(a) and the Fourteenth Amendment to the Constitution of the United States. (R. 139, 163). Respondents' complaints sought actual and punitive damages, plus reinstatement and back pay. All parties demanded trial by jury of the two civil rights cases as to any issues so triable, and those two actions were consolidated for trial. (R. 52). No request was made to the District Court by respondents for an order directing an administrative hearing, although they were still employed when their two complaints were filed. (R. 107).

Respondents successfully resisted a motion to remand the declaratory judgment suit on the ground that its retention in federal court was essential to preservation of their civil rights claims, even though the suit raised no federal questions and did not involve parties of diverse citizenship. (R. 43-47).

A three-week jury trial of respondents' First Amendment damage claims under 42 U.S.C. § 1983 resulted in a general verdict adverse to respondents. Following the jury's verdict, respondents' motions for new trial and for judgment n.o.v. were overruled and judgment was entered upon the verdict. (R. 489).

The verdict determined favorably to petitioners the factual issues defined in the instructions as follows:

> "In no case, however, may a decision to non-renew a teacher's contract be premised or based, in whole or in part, upon an individual teacher's exercise of his or her constitutional rights." (R. 271).
>
> "In the event the jury should find the recommendation as to non-renewal as to each plaintiff was based upon dishonest and/or false reasons advanced by the defendant Smalling, as above set forth, they should find for each plaintiff on the civil rights issue of liability, and then proceed to the issue of damages." (R. 280).
>
> "In order to be entitled to the qualified privilege defense, the board members must establish by a preponderance of the evidence that they acted in good faith. In the context of this case, good faith is established if the jury finds that the board members voted not to renew the plaintiffs' contracts based upon what they honestly believed to be good and valid reasons." (R. 284).

The trial judge had reserved for his disposition respondents' Fourteenth Amendment claims for reinstatement with back pay, viewing such relief as equitable in nature. (R. 92, 270). It was agreed that the record made to the jury would be available to the court for determination of issues in equity not foreclosed by the jury's verdict. (R. 90, 390, 364, 410-11).

Thereafter, the trial judge considered respondents' alternative equitable claims to reinstatement and back pay for alleged denial of procedural due process. He ruled that petitioners, acting in their official capacity, were not amenable to suit as persons under 42 U.S.C. § 1983, but that liability could be so asserted directly under the Fourteenth Amendment, with jurisdiction predicated upon 28 U.S.C. § 1331. (R. 92-93). Although concluding that respondents had an expectancy of continued employment, the trial judge denied reinstatement and back pay on several grounds, including Eleventh Amendment immunity of the school district as to monetary relief in the form of back pay, that petitioners had not acted arbitrarily or capriciously or upon constitutionally impermissible grounds, and that respondents had waived an administrative hearing. He then dismissed as moot the removed declaratory judgment case. (R. 105, 107-09).

Respondents appealed to the Tenth Circuit Court of Appeals only the trial judge's order denying reinstatement and back pay and left standing the jury's verdict, as well as the trial court's finding that petitioners, in denying a hearing, had not acted arbitrarily or capriciously or upon constitutionally impermissible reasons. (R. 55).

Respondents advised the Court of Appeals that their appeal was ". . . limited to the correctness of the District Court's rulings on the Eleventh Amendment and reinstate-

ment questions" and that the trial court's ". . . ruling that 28 U.S.C. § 1331 providing jurisdiction over all of the teachers' claims eliminated any need for § 1343 jurisdiction." (Brief for Appellants, pp. 12, 9).

While agreeing with the trial court that reinstatement and back pay were precluded, the Court of Appeals reversed the judgment as to Eleventh Amendment immunity under the Fourteenth Amendment claims. Then, *sua sponte* it directed a further trial as to any damages attributable to the failure to afford respondents a pre-termination administrative hearing. It further held that petitioners' failure to cross-appeal, as to the trial court's determination of respondents' expectancy of continued employment, established as the law of the case that respondents were constitutionally entitled to a pre-termination hearing, and that without a cross-appeal, petitioners were precluded from asserting in support of the judgment that respondents had no expectancy of continued employment.

REASONS FOR GRANTING THE WRIT

I.

The Judgment and Opinion Below Have Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court

The decision below rests squarely upon the propositions that a teacher's claim for damages against board members of a local school district, acting in official capacities, for alleged denial of procedural due process is impliedly authorized by the Fourteenth Amendment to the Constitution of the United States without the limitations attaching to actions under 42 U.S.C. § 1983, and that juris-

diction to entertain such an action arises under 28 U.S.C. § 1331(a). In *Mt. Healthy City Board of Ed.* v. *Doyle*, ... U.S. ....., 50 L. Ed. 2d 471 at 478, this Court noted that the question whether it should ". . . imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent."

It would surely be presumptuous for petitioners to detail at any length the reasons for believing that the questions here presented are of importance in the body of federal law, when this Court has already concluded that such is the case.

A. Are Local School Districts Subject to Direct Suit Under the Fourteenth Amendment When the Same Action Would Lie Under 42 U.S.C. § 1983, Except for Its "Person" Requirement?

Both courts below properly assumed that any monetary recovery against petitioners in their official capacities, as Board Members of U.S.D. 480, would be payable from school district funds. The District Court further assumed that the Eleventh Amendment precluded recovery, while the Court of Appeals concluded otherwise upon the basis of this Court's holding in *Mt. Healthy City Board of Ed.*, *supra*, decided after the case had been submitted to the Court of Appeals.

Thus, local public school boards and similar municipal corporations are now exposed to retroactive monetary awards in Fourteenth Amendment damage actions, jurisdictionally predicated upon 28 U.S.C. § 1331(a), but ". . .

without legislative direction." *Moor* v. *County of Alameda*, 411 U.S. 693 at 701. The limitations upon similar actions arising under 42 U.S.C. § 1983 were simply ignored in the opinion below.

The legislative history of 42 U.S.C. § 1983, as reviewed by this Court, clearly discloses both Congressional reluctance to impose monetary penalties thereunder upon local governmental bodies and even possible doubts as to its constitutional authority to do so. *Moor* v. *County of Alameda, supra; City of Kenosha* v. *Bruno*, 412 U.S. 507; *Monroe* v. *Pape*, 365 U.S. 167. To conclude, as did the Court of Appeals, that local governing bodies do not enjoy a state's Eleventh Amendment immunity, but that their conduct nevertheless amounts to state action for damage suit recoveries directly under the Fourteenth Amendment, results in a Catch-22 situation.

Cities, counties, school districts and similar municipal corporations perform countless governmental functions. The financial impact of the decision below upon the performance of such functions appears self-evident as does the resulting necessary increase in the case loads of those courts which must entertain such actions. If Fourteenth Amendment damage claims are maintainable against local governmental entities notwithstanding Congressional exclusion of such claims under 42 U.S.C. § 1983 then the certainty thereof throughout the nation is obviously a matter of prime importance to all departments of government affected thereby.

This conclusion is further buttressed by the view of the Court of Appeals, discussed below, that strict liability arises under Fourteenth Amendment due process claims against local governmental entities, even though their officials may have acted in complete good faith.

B. Are Defenses Available to Persons Sued Under 42 U.S.C. § 1983 Available to Legal Entities Directly Sued Under the Fourteenth Amendment?

If direct Fourteenth Amendment claims for damages are to be maintainable against a local governmental entity, then this Court should decide whether the entity may be held strictly liable when it neither knew nor should have known that the action taken would violate the constitutional rights of persons affected. (R. 482).

The trial judge here found that petitioners did not act arbitrarily or capriciously by not affording a pre-termination hearing, and the jury determined that petitioners' non-renewal decision was motivated by budgetary considerations, wholly untainted by constitutionally impermissible reasons. The Court of Appeals, nevertheless, remanded the case only for ascertainment of damages owed by the school district because a pre-termination hearing did not take place.

As an artificial entity or person, the school district could only act through and by petitioners who, under the test of *Wood* v. *Strickland,* 420 U.S. 308, were found to be immune from personal liability. In the same vein, a municipal corporation, as such, is accountable only for purposeful violations of the Fourteenth Amendment's equal protection clause. *Arlington Heights* v. *Metro. Housing Corp.*, ... U.S. ....., 50 L. Ed. 2d 450.

The school district here sought legal counsel as to whether state law afforded respondents some property interest affected by non-renewal, and a declaratory judgment suit was instituted on its behalf in search of the appropriate answer. If petitioners, personally, are not "charged with predicting the future course of constitutional

law", *Wood* v. *Strickland,* 420 U.S. 308 at 322, then garbing them in their official capacities would not seem to enhance their foresight to the point of warranting strict liability for falling short of omniscience.

II.

The Opinion Below Conflicts With Applicable Decisions of This Court

A. Were the District Court's and Jury's Determinations That Respondents' Contracts Were Terminated for Good Cause Dispositive of Respondents' Fourteenth Amendment Damage Claims?

The decision below ignored the effect of the unappealed from determination by the jury that petitioners were in no way influenced by constitutionally impermissible reasons when they decided not to renew respondents' employment contracts. While it followed the portion of this Court's opinion in *Mt. Healthy City School Dist. Bd. of Education* v. *Doyle,* ..... U.S. ....., 50 L. Ed. 2d 471, dealing with Eleventh Amendment immunity, the Court of Appeals failed to observe the causation standard set forth in the balance of the Court's opinion, which standard was fully satisfied by the unchallenged findings of the trial tribunal.

Assuming only for purposes of that decision that the school district itself was a proper party, this Court "found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy City School District Bd. of Education,* ..... U.S. ....., 50 L. Ed. 2d 471 at 483.

In the instant proceedings, respondents had the benefit of a three-week jury trial, with the full panoply of an extensive due process hearing inherent therein available to establish the causative reasons for non-renewal of respondents' contracts. The jury promptly concluded that petitioners were acting in good faith and had reduced the district's teaching staff because of budgetary considerations. The jury's verdict was supported by substantial evidence, no appeal was taken therefrom, and it found adversely to respondents all facts necessary to support either legal or equitable relief. *Curtis* v. *Loether*, 415 U.S. 189. Although in petitioners' view the trial judge was bound by the jury's verdict, he also independently concluded that an order directing a hearing would have been an exercise in futility because of known factual circumstances. (R. 108).

Accordingly, there was no necessity or occasion here for further proceedings to determine whether the same decision would have been reached as to non-renewal of respondents' contracts. Both the jury and the trial court have already so decided. With no appeal taken from either determination, the Court of Appeals was bound to observe them and to honor the attendant consequences required by this Court's decision in the *Mt. Healthy City School District* case.

B. Did Petitioners' Failure to Appeal Preclude Them From Supporting the Trial Court's Judgment With Reasons Inconsistent With Those Given by Him?

Having prevailed in the trial court on the respondents' claims, petitioners filed no cross-appeal to the Court of Appeals. As one ground for upholding the District Court's judgment, petitioners contended that the trial judge's *dictum* as to respondents' expectancy of continued employment under Kansas law was incorrect. There were no state court decisions supporting such *dictum*, and the Kansas Continuing Contract Act then explicitly provided that, even after contracts had been renewed, they were subject to cancellation for budgetary reasons. K.S.A. 74-5412. (App. C, p. A40). The jury's verdict was not appealed by respondents, and it expressly determined that non-renewal of their contracts was due to budgetary reasons. Furthermore, Kansas provides for tenure under statutory provisions not applicable to respondents. K.S.A. 72-5401-5409. The Court of Appeals for the Sixth Circuit has held that the co-existence of a statutory tenure system and a non-tenure statutory system precludes any inference of an expectancy of continued employment under the latter. *Ryan* v. *Aurora City Bd. of Ed.*, 540 F.2d 222 (C.A. 6th, 1976), cert. denied, ... U.S. ....., 50 L. Ed. 2d 753.

The Court below refused to consider any of the foregoing matters on the ground that petitioners' failure to appeal established as the law of the case that respondents had an expectancy of continued employment. That ruling squarely conflicts with established principles of appellate review, as recently and firmly enunciated by this Court.

> "The court held that the insurer was precluded from arguing on appeal the applicability of Illinois substantive law, because it had not cross-appealed from the District Court's ruling that Michigan law applied. 524 F.2d, at 379 n 1.
>
> "The Court of Appeals' decision on this issue is plainly at odds with the 'inveterate and certain' rule, Morley Co. v. Md Casualty Co. 300 US 185, 191, 81 L Ed 593, 57 S Ct 505 (1937), of United States v. American Railway Express Co. 265 US 425, 435, 68

L Ed 1087, 44 S Ct 560 (1924), where an unanimous Court said:

> 'It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. *But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'* (Footnote omitted.) 265 U.S. at 435, 68 L Ed 1087, 44 S Ct 560." (Emphasis added). *Massachusetts Mutual Ins. Co.* v. *Ludwig*, 426 U.S. 479 at 480-81.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1948

UNIFIED SCHOOL DISTRICT NO. 480,
Plaintiff-Appellee,

v.

LILA EPPERSON and OLETA A. PETERS,
Defendants-Appellants.

• • • • •

LILA EPPERSON and OLETA A. PETERS,
Plaintiffs-Appellants,

v.

J. L. SMALLING, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Kansas
(D.C. Nos. Civ. W-4819, W-4820 and W-4821)

(Filed March 18, 1977)

Robert M. Weinberg (Michael H. Gottesman of Bredhoff, Cushman, Gottesman & Cohen; David Rubin; Ward D. Martin and John C. Frieden of Crane, Martin, Claussen, Hamilton & Barry, on the brief), for Lila Epperson and Oleta A. Peters, Plaintiffs-Appellants.

Donald R. Newkirk (Gerrit H. Wormhoudt and J. Eric Engstrom; Of Counsel: Fleeson, Gooing, Coulson &

Kitch, on the brief), for J. L. Smalling, et al., Defendants-Appellees.

Before LEWIS, Chief Judge, and McWILLIAMS and BARRETT, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a dispute between Unified School District No. 480, in Seward County, Kansas, and two of its former teachers, Oleta Peters and Lila Epperson. Peters and Epperson had been teaching 11 and 17 years respectively in District No. 480 when they, along with others, were notified by the District on February 9, 1972, that their teaching contracts would not be renewed for the ensuing school year of 1972-73. Peters and Epperson were each under one-year teaching contracts, which, under Kansas law, would automatically continue to the following school year unless written notice of an intention to terminate the contract was furnished by March 15. Kan.Stat. § 72-5411. The reason given by the District for not renewing the teaching contracts of both Peters and Epperson, along with the others, was budgetary cuts, necessitated by a decrease in school enrollments with a corresponding decrease in state aid.

Peters and Epperson were president and president-elect, respectively, of the local branch of the National Education Association, and at about this time there had been some rather heated bargaining negotiations between the local NEA and the school board. Peters and Epperson were of the firm view that the refusal of the school board to renew their teaching contracts was not really caused by budgetary problems, but on the contrary was in retaliation for the exercise by them of their First Amendment right to free speech in connection with their NEA activi-

ties. In any event, Peters and Epperson retained counsel, and asked the board for a hearing. The board, on advice of its counsel, refused this request for a hearing, believing that a teacher was not entitled to a hearing upon the refusal to renew a one-year teaching contract because of budgetary problems. We note that these events transpired prior to Perry v. Sindermann, 408 U.S. 593 (1972).

It was in this general factual setting that District No. 480 brought a declaratory judgment action in a state court of Kansas against Peters and Epperson, seeking a declaration that, under the terms of the teaching contracts and the state law of Kansas, the District did not have to afford them a hearing. Peters and Epperson caused the declaratory judgment action to be removed to the United States District Court for the District of Kansas. 28 U.S.C. § 1441(b).

At the same time the declaratory judgment action was removed to federal court, Peters and Epperson instituted individual proceedings in the United States District Court for the District of Kansas against the members of the school board for District No. 480, both in their official capacity as school board members, and individually. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343. The claim, in essence, was that Peters and Epperson had been denied both procedural and substantive due process in that, first, under the Fourteenth Amendment they should have been afforded a hearing before their teaching contracts were finally not renewed, and, second, that though budgetary reasons were assigned as the reason for non-renewal, in reality their contracts were not renewed because of the exercise by them of their First Amendment right to free speech. These three actions, namely, the District's declaratory judgment action, and the individual actions of Peters and Epperson were consolidated for hearing in the trial court. By stipulation the claim based

on abridgment of First Amendment rights was tried first to a jury, such trial taking three weeks. It was agreed that the remaining issues would later be tried to the court, sitting without a jury, on the basis of the record made in the trial of the First Amendment claim.

The jury trial of the First Amendment claim resulted in a verdict for the members of the school board, and judgment to that effect was duly entered. The claim that Peters and Epperson were entitled to a hearing before nonrenewal was later tried to the court, based on the record as made at the jury trial on the First Amendment claim. The trial court held that Peters and Epperson had a sufficient property interest to entitle them to a hearing before any final determination was made not to renew their teaching contracts. However, judgment was entered in favor of the members of the school board sued as individuals, on the ground of a qualified privilege. Wood v. Strickland, 420 U.S. 308 (1975) and Bertot v. School Dist. No. 1, Albany County, Wyo., 522 F.2d 1171 (10th Cir. 1975). As concerns the members of the school board sued in their official capacity, the trial court concluded that notwithstanding the fact that Peters and Epperson were not afforded the hearing to which they were entitled, no money judgment for back pay could be entered because of the Eleventh Amendment. The trial court further concluded that under the circumstances, namely, a jury having found that the teaching contracts of both Peters and Epperson were not renewed because of budgetary problems, and not because of the exercise by them of their First Amendment rights, reinstatement was "inappropriate." Accordingly, judgment was entered in favor of the school board members acting in their official capacity.

Peters and Epperson now appeal and urge but two grounds for reversal: (1) The trial court erred in concluding that the Eleventh Amendment precluded the entry of a money judgment; and (2) the trial court erred in concluding that reinstatement was inappropriate.

As indicated, the trial court found that both Peters and Epperson had a sufficient property interest under Perry v. Sindermann, 408 U.S. 593 (1972) to entitle them to a pre-termination hearing. The school board has not appealed, and hence it is the law of the case that when the local school board refused to afford them a hearing, Peters and Epperson were denied procedural due process afforded by the Fourteenth Amendment.

Though having found that the constitutional rights of both Peters and Epperson had been thus violated, the trial court denied relief to both teachers. As indicated, the trial court concluded that under the circumstances reinstatement some three years after nonrenewal was inappropriate, and that a money judgment for back pay or consequential damages against the local school board members acting in their official capacity was precluded by the Eleventh Amendment. On appeal, counsel for Peters and Epperson argue that since it has been determined that Peters and Epperson were denied procedural process when the school board denied them a hearing before termination, reinstatement was required, and that additionally, they were entitled to pay from the date of their termination in 1972 until the date of their reinstatement, plus all consequential damages. We do not agree with this argument, at least not in its entirety, which, in our view, overlooks the fact that a jury has after a three-week trial found that the terminations were in fact necessitated by budgetary reductions and were not prompted by the exercise by Peters and Epperson of their First Amendment right of free speech. To grant Peters and Epperson all that which they now seek, namely, reinstatement, lost pay, and consequential damages, would afford them all the

relief they could have obtained had they prevailed in the First Amendment claim, which they did not, and would in practical effect render the three-week trial a nullity. Such would be utterly unrealistic.

Other courts have also been faced with the problem of what to do when several years after a teacher's contract is terminated or not renewed, it is determined, upon trial, that the termination or nonrenewal was for good cause, but that nevertheless there was a denial of procedural due process in that the teacher was not afforded a hearing before termination or nonrenewal. *See* Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975); Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973); and Horton v. Orange County Board of Education, 464 F.2d 536 (4th Cir. 1972). In each of these three illustrative cases reinstatement was held to be inappropriate. In *Hostrop* the Seventh Circuit pointed out that the "wrong" done the plaintiff school teacher was not the termination, as such, of the teaching contract, for upon trial it had been determined that termination was justified; rather the "wrong" was the deprivation of the teacher's procedural due process right to notice and a hearing. The latter "wrong" was deemed insufficient to justify reinstatement some five years after the teaching contract had been terminated, and in light of the trial court's determination, after trial, that the teacher's termination was for just cause. The trial court in the instant case did not under the circumstances err in holding that reinstatement was inappropriate.

In each of the three cases above cited it was held that the plaintiff teacher, though not entitled to reinstatement, was nonetheless entitled to some form of money judgment for the wrong done him or her in terminating the teaching contract without a pre-termination hearing. However, in none of those cases was the Eleventh Amendment an issue. In *Hostrop*, for example, by footnote at p. 577 the court stated that the Eleventh Amendment did not affect the suit because Illinois had waived any immunity the school board might otherwise have. In *Zimmerer* and *Horton*, the Eleventh Amendment was not mentioned.

In the instant case, however, the Eleventh Amendment is an issue. The trial court clearly indicated that but for the Eleventh Amendment a money judgment in favor of Peters and Epperson might well be in order, but concluded that under the circumstances the Eleventh Amendment precluded the entry of a money judgment against the local school board members, acting in their official capacity as members of the school board for School District No. 480. In thus holding the trial court in our view committed error. We do not deem the Eleventh Amendment to be applicable to District No. 480.

The Eleventh Amendment reads as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

It is well established that under the Eleventh Amendment a nonconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. *See* Edelman v. Jordan, 415 U.S. 651 (1974) and the cases cited therein at page 663. Furthermore, a suit in a federal court against the members of a state board or agency acting in their official capacities is a suit against the board or agency itself, and subject to the immunity afforded by the Eleventh Amendment. Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945).

In determining in a given case whether a board or agency is an arm or alter ego of the state and therefore in reality the state within the meaning of the Eleventh Amendment, the powers, nature, and characteristics of the board or agency must be critically examined under state law. Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975). Two primary tests for distinguishing alter egos, enjoying the state's Eleventh Amendment immunity, from so-called political subdivisions, such as counties and municipalities, which do not enjoy such immunity are: (1) To what extent does the board, although carrying out a state mission, function with substantial autonomy from the state government and, (2) to what extent is the agency financed independently of the state treasury. Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975) and George R. Whitten, Jr., Inc. v. State Univ. Construction Fund, 493 F.2d 177 (1st Cir. 1974). In this latter connection, it is agreed that if the money judgment sought to be entered against a board or agency will be satisfied out of the state treasury, then the board is immune from suit under the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974). However, this rule has no application to the instant case, as it is agreed, and was so found by the trial court, that any money judgment which might be awarded either Peters or Epperson against the school board members acting in their official capacities would not come from state funds, but from monies raised by special levy within the school district itself. Kan.Stat. § 72-8209.

A very recent case, which the trial court did not have the benefit of, is most helpful in determining whether the members of the school board for District No. 480, acting in their official capacity, are under the Eleventh Amendment immune from suits brought in the federal courts. *See* Mt. Healthy City School District Board of

Education v. Doyle, ... U.S. ..... (January 11, 1977). There a local school board in Ohio determined not to renew a teaching contract and the teacher involved brought suit in federal court against the local board, alleging a violation of his First and Fourteenth Amendment rights, with jurisdiction being based on 28 U.S.C. §§ 1331 and 1343. The trial court in *Mt. Healthy* held that any immunity enjoyed by the local school board under the Eleventh Amendment had been waived by Ohio statute. This holding was not disturbed by the Circuit Court on appeal. On certiorari, the Supreme Court, expressing some doubt that there was a waiver, preferred to address itself to the question of whether the local school board had any Eleventh Amendment immunity in the first place. In concluding that the local school board did *not* enjoy Eleventh Amendment immunity, the Supreme Court spoke as follows:

> The bar of the Eleventh Amendment to suit in federal courts extends to states and state officials in appropriate circumstances, *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury*, *supra*, but does not extend to counties and similar municipal corporations. See *County of Lincoln* v. *Luning*, 133 U.S. 529, 530 (1890); *Moor* v. *County of Alameda*, 411 U.S. 693, 717-721 (1973). The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends at least in part upon the nature of the entity created by state law. Under Ohio law the "state" does not include "political subdivisions," and "political subdivisions" do include local school

districts. Ohio Rev. Code § 2743.01. Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, Ohio Rev. Code § 3301.07, and receives a significant amount of money from the State. Ohio Rev. Code § 3317. But local school boards have extensive powers to issue bonds, Ohio Rev. Code § 133.27, and to levy taxes within certain restrictions of state law. Ohio Rev. Code §§ 5705.02, 5705.03, 5705.192, 5705.194. On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the State. We therefore hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts.

We perceive a considerable similarity between District No. 480 in Seward County, Kansas and the local Ohio school board in *Mt. Healthy*. Local unified school districts in Kansas can sue and be sued, execute contracts and hold real and personal property, and in general possess the "usual powers of a corporation for public purposes." Kan.Stat. § 72-8201. For budgetary and taxing purposes, a local unified school district in Kansas is considered a municipality. Kan.Stat. § 72-8204a. The State of Kansas, as does the State of Ohio, furnishes substantial state aid to the local school districts, though the latter fix their own budgets and are empowered to levy and collect taxes within the local school district with which to fund their budget. Kan.Stat. §§ 72-7021, 8204(a), 79-2925, 2931.

In *Mt. Healthy*, the Supreme Court stated that the local school board was subject to "some guidance" from the Ohio State Board of Education. In the instant case, under Article 6, section 2(a) of the Kansas Constitution. the local unified school districts are subject to the "general

supervision" of the State Board of Education. Though this has been held by the Kansas Supreme Court to be a rather broad supervisory power, it is still "supervision," and not "control." State ex rel. Miller v. Board of Education of Unified School District No. 398, 511 P.2d 705 (Kan. 1973). Any distinction between "some guidance" in *Mt. Healthy* and "general supervision" in the instant case is insufficient in our view to tip the scales. In short, we conclude that "on balance," School District No. 480 in Seward County, Kansas, and its school board members acting in their official capacity, are not the alter ego of the state, but are more like a municipality, for example, and hence do not enjoy Eleventh Amendment immunity.

We do not believe our conclusion that School District No. 480 is not entitled to Eleventh Amendment immunity is in any way at odds with either Brennan v. University of Kansas, 451 F.2d 1287 (10th Cir. 1971) or Harris v. Tooele County School District, 471 F.2d 218 (10th Cir. 1973). In *Brennan* we held that the University of Kansas and its University Press of Kansas were an arm or alter ego of the state and entitled to Eleventh Amendment immunity. To us there are at once apparent significant differences between the University of Kansas and School District No. 480. For one, the University does not levy and collect taxes. And under Article 6, section 2(b) of the Kansas Constitution the State Board of Regents has "control," in addition to "supervision," over all institutions of higher learning. We know that a typical state board of regents really runs the state university, whereas the State Board of Education in Kansas merely "supervises" the local school districts, with the latter having a high degree of autonomy.

In *Harris* we held that a local school district in Utah was an alter ego of the State of Utah. However, an

influencing factor in that case was the possibility that a money judgment rendered in federal court against the school district might be paid, at least partially, out of state funds. In the instant case, as referred to above, it is agreed, and was so found by the trial court, that any money judgment which might be entered in favor of Peters or Epperson against District No. 480 would be raised by special levy within the district, and would not come from the state.

The judgment is reversed and the case is remanded to the trial court with direction that it determine the damages fairly attributable to the failure of the school board to afford Peters and Epperson their Fourteenth Amendment right to a pre-termination hearing. We recognize the damage question, and the extent of any such recovery, may itself be a troublesome one. This precise matter was discussed at some length in Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, at pp. 578-580 (7th Cir. 1975). Like the Seventh Circuit, we think this problem should be decided by the trial court.

To reach a contrary result in the instant case would to us be a bit incongruous, in that we would be holding that there was no relief or remedy whatsoever for an admitted violation of a constitutional right. The right to notice and a hearing before termination or nonrenewal of a teaching contract, assuming the particular individual enjoys such a right, is an important one, and to hold that such right may be violated without affording the injured party any redress of any kind tends to deprive the right of meaning. Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31, at p. 40 (3d Cir. 1974), vacated on other grounds, 421 U.S. 983 (1975).

Judgment reversed and case remanded for further proceedings consonant with the views herein expressed.

MARCH TERM—April 19, 1977

Before The Honorable David T. Lewis, Chief Judge
The Honorable Robert H. McWilliams, Circuit Judge
The Honorable James E. Barrett, Circuit Judge

No. 75-1948

UNIFIED SCHOOL DISTRICT NO. 480, Seward County, Kansas,
Plaintiff-Appellee,

v.

LILA EPPERSON and OLETA A. PETERS,
Defendant-Appellant.

LILA EPPERSON,
Plaintiff-Appellant,

v.

J. L. SMALLING, Superintendent of Unified School District No. 480, Seward County, Kansas; and JO ANN SHARP, AL SHANK, DON AVEY, ROBERT CARLILE, GEORGE ROSEL, WAYNE ROSS and W. S. SEBRING, individually and as members of the Board of Education of Unified School District No. 480, Seward County, Kansas,
Defendant-Appellees.

OLETA PETERS,
Plaintiff-Appellant,

v.

J. L. SMALLING, Superintendent of Unified School District No. 480, Seward County, Kansas; and JO ANN SHARP, AL SHANK, DON AVEY, ROBERT CARLILE, GEORGE ROSEL, WAYNE ROSS and W. S. SEBRING, individually and as members of the Board of Education of Unified School District No. 480, Seward County, Kansas,
Defendants-Appellees.

This matter comes on for consideration of appellee's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

Howard K. Phillips, Clerk
By /s/ Robert L. Hoecker
Chief Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4819

UNIFIED SCHOOL DISTRICT No. 480, Seward County, Kansas,
Plaintiff,

vs.

LILA EPPERSON and OLETA A. PETERS,
Defendants.

Civil Action No. W-4820

LILA EPPERSON,
Plaintiff,

vs.

J. L. SMALLING, Superintendent of Unified School District No. 480, Seward County, Kansas; et al.,
Defendants.

Civil Action No. W-4821

OLETA PETERS,
Plaintiff,

vs.

J. L. SMALLING, Superintendent of Unified School District No. 480, Seward County, Kansas; et al.,
Defendants.

DECISION OF THE COURT

(Filed August 25, 1975)

The three captioned cases were consolidated by stipulation of the parties. All three cases were precipitated by a decision of defendants not to renew the teaching contracts of Lila Epperson and Oleta Peters for the school year beginning in the fall of 1972. The action is presently before the Court for disposition of the following issues. In cases numbered W-4820 and W-4821, plaintiffs contend defendants' failure to afford them an opportunity for a hearing violated Fourteenth Amendment due process rights. Plaintiffs also contend that the decision not to renew their contracts violated due process tenets because such decision was arbitrary and capricious. In case W-4819, there is presently pending a motion to remand. This latter case is a declaratory judgment action which was removed to this court from the Seward County District Court, Seward County, Kansas. The declaratory judgment action was filed by Unified School District No. 480 (U.S.D. 480) to determine whether, under state law and the teachers' contracts, the Board was obligated to provide the teachers a hearing. The issues arise in the following factual and procedural context. (For convenience the parties will be referred to by their party designation in the actions filed by the teachers.)

On February 9, 1972, plaintiffs Peters and Epperson were notified that their teaching contracts would not be renewed for the following school year. Notice was given in writing and in compliance with K.S.A. §72-5411. Plaintiffs immediately employed counsel and counsel requested plaintiffs be afforded a hearing. Superintendent Smalling urged the School Board to grant a hearing. The School Board, however, immediately sought advice from its counsel, which counsel advised that a hearing was not required. On the basis of that advice, the request for a hearing was denied. On March 7, 1972, again on the advice of counsel,

the Board filed a declaratory judgment action in the Seward County District Court seeking a determination of its duty under the teachers' contracts and under state law. Epperson and Peters, defendants in the declaratory judgment action, removed the action to this court under the provisions of 28 U.S.C. §1441(b). A motion to remand was denied. Epperson and Peters simultaneously brought actions alleging First and Fourteenth Amendment violations. Specifically, plaintiffs alleged that defendants decided not to renew their teaching contracts because of plaintiffs' participation in the National Education Association, and other activities protected by the First Amendment. Plaintiffs further allege that the failure to provide a hearing concerning their non-renewal violated plaintiffs' Fourteenth Amendment due process rights. The Court reserved ruling on the due process claim pending a jury trial on the First Amendment claim. On the First Amendment issue the jury returned a verdict in favor of all defendants. At the jury trial both parties presented evidence relevant to the due process claim. Both parties have stipulated that the Court may rely on the evidence presented at the trial for purposes of determining the due process claim and that issue is therefore ripe for disposition. Plaintiffs also argue that the jury did not determine whether the non-renewal decision was arbitrary and capricious. The motion to remand the declaratory judgment action has been renewed.

JURISDICTION FOR DUE PROCESS CLAIM

In their original complaint plaintiffs alleged violation of 42 U.S.C. §1983, with jurisdiction premised upon 28 U.S.C. §1334. The complaint named as defendants Superintendent Smalling and the School Board members for U.S.D. No. 480. All defendants were named individually

and in their official capacity. The complaint was subsequently amended by adding an allegation that jurisdiction was also based on 28 U.S.C. §1331. This amendment alleges plaintiffs' complaint arises under the laws of the United States and further alleges that the amount in controversy exceeds $10,000.00.

Section 1983 of the Civil Rights Act creates a cause of action but does not confer jurisdiction. Jurisdiction is derived from 28 U.S.C. §1334, 28 U.S.C. §1331, or both. Section 1334 contains no requirement concerning the amount in controversy, and Section 1983 actions may be brought without allegation or proof of jurisdictional amount. *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), rehearing denied 319 U.S. 782, 63 S.Ct. 1170, 87 L.Ed. 1726.

To the extent plaintiffs seek monetary relief against defendants in their official capacity, the complaint fails to state a cognizable claim for violation of §1983 and fails to confer jurisdiction under §1343. Section 1983 provides for relief against any "person" who, under color of state law, violates rights guaranteed by the Constitution. In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), it was established, on the basis of the relevant legislative history, that a municipal corporation is not a "person" as that term is used in §1983. This same analysis was subsequently applied to preclude actions against other governmental entities. The courts appear to universally agree, where the question has arisen, that neither a school district nor a school board is a "person" subject to suit under §1983. See *Butts v. Dallas Independent School District*, 436 F.2d 728 (5th Cir. 1971); *Howey v. Sadler*, 331 F.2d 387 (9th Cir. 1964); *Powers v. Mancos School District Re-6 Montezuma County, Colorado*, 369 F.Supp. 684 (D.Colo. 1973); *Potts v. Wright*, 357 F.Supp. 215 (D.Pa. 1973); *Davis v.*

Barr, 373 F.Supp. 740 (D.Tenn. 1973); *Abel v. Gosha*, 313 F.Supp. 1030 (D.Wis. 1970).

Monroe v. Pape, supra, was an action for damages and several courts subsequently held that the *Monroe* definition of "person" should be limited to damage actions. In *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970), the Court ruled that a school district is a person when the plaintiff sought equitable relief. In that case, as here, the plaintiff sought reinstatement and back pay. The distinction between equitable and legal relief was, however, erased for actions against the governmental entity itself by *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). In the *Bruno* case the owners of retail liquor establishments sought injunctive and declaratory relief to regain their liquor licenses. They alleged that the cities of Racine and Kenosha had violated due process requirements by failing to provide a proper hearing on termination of such licenses. A three-judge court held that in light of the equitable nature of the action, jurisdiction was conferred by 28 U.S.C. §1334(3). The Supreme Court reversed, concluding that a municipal corporation was not a "person" for equitable or legal relief.

Plaintiffs seek to avoid the barrier to §1983 actions against governmental entities by naming each of the defendants in their official capacity. Where damages were sought, similar attempts have been rejected. See *O'Brien v. Galloway*, 362 F.Supp. 901 (D.Del. 1973). There appears no justification for treating damages and monetary equitable relief differently. Even where the relief sought is equitable, such as the back pay sought in this case, the award must be taken from the public treasury and the action is therefore indistinguishable from an action against the governmental entity itself. See *O'Brien v. Galloway*, supra; *Jones v. Dinwiddie County School Board of Dinwiddie City, Va.*, 373 F.Supp. 1105 (E.D. Va. 1974).

In addition to §1343 jurisdiction, plaintiffs rely on §1331. Section 1331 grants jurisdiction for civil actions wherein the amount in controversy exceeds $10,000.00, and the cause of action "arises under the Constitution, laws, or treaties of the United States." If plaintiffs are permitted to base a cause of action directly on the Fourteenth Amendment, there would be no requirement that the action be brought against a "person." The Fourteenth Amendment applies to any state action. See *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F.2d 31 (3rd Cir. 1974).

The right to bring an action directly under an amendment to the Constitution was treated in *Bivins v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 2001, 29 L.Ed.2d 619 (1971). The Supreme Court there held that an action for damages could be brought against federal agents for violation of the Fourth Amendment. Justice Harlan's concurring opinion indicates courts may hear actions arising directly under a constitutional amendment only where "necessary" or "appropriate" to enforcement of that amendment. His opinion would suggest that where congress has enacted legislation, such as §1983, which enforces an amendment, no cause of action could be based directly on that amendment. The majority opinion, however, expresses no such limitation.

In *Brault v. Town of Milton,* 43 U.S.L.W. 2388 (2nd Cir. 2-24-75), the *Bivins* rationale was applied to recognize a cause of action arising directly under the Fourteenth Amendment. See *contra, Weathers v. West Yuma County School District R-J-1,* 387 F.Supp. 552 (D. Colo. 1974). In the *Brault* case it was argued that a cause of action based directly on the Fourteenth Amendment would circumvent the restriction to actions against persons provided in §1983. The Court noted, however, that this limitation would remain for actions alleging $10,000.00 or less in controversy, and concluded that a Fourteenth Amendment cause of action could be maintained without regard to §1983, where the jurisdictional amount satisfied the requirements of 28 U.S.C. §1331.

Approval of a Fourteenth Amendment cause of action was implied in *City of Kenosha v. Bruno,* supra. After ruling that no action would lie under §1983 because the City was not a person, the Supreme Court remanded the action for a determination concerning the amount in controversy and possible jurisdiction under §1331. The plaintiffs in that case were seeking to enforce Fourteenth Amendment due process provisions.

This Court therefore finds that jurisdiction is conferred by §1331 for a cause of action based on the Fourteenth Amendment against the defendants in their official capacity. See *Skehan v. Board of Trustees of Bloomsburg State College,* supra; *United Farm of Florida Housing Project, Inc. v. City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *Matherson v. Long,* 442 F.2d 556 (2nd Cir. 1971); *Grubbs v. White Settlement Independent School District,* 390 F.Supp. 895 (N.D. Tex. 1975).

Each plaintiff originally alleged amounts of damages well in excess of $10,000.00. For the alleged due process violation alone, plaintiffs now seek only reinstatement, back pay, and expense incurred seeking other employment. For plaintiff Epperson, the total amount sought is $7,281.83. For plaintiff Peters, the amount of $17,596.93. For plaintiff Peters the due process claims alone clearly establish the jurisdictional amount. For plaintiff Epperson, the Court must look to the total amount sought originally for both due process and freedom of speech violations. If the jurisdictional amount exists at the time jurisdiction is invoked, subsequent events generally will not destroy the

jurisdictional amount requisite. Failure of recovery or dismissal of one claim does not, even where the remaining claim is for less than the jurisdictional amount, nullify jurisdiction of the remaining claim. See *Lynch v. Porter,* 446 F.2d 225 (8th Cir. 1971). The jury's finding of no liability on the first amendment claims likewise does not defeat the Court's jurisdiction over the remaining claim. This is especially so where, as here, the evidence presented to the jury is to form the basis for decision on the remaining claim. Economy of judicial time dictates the assumption of jurisdiction.

ELEVENTH AMENDMENT CONSIDERATIONS AS TO JURISDICTION

Defendants contend that the monetary relief sought from the defendants in their official capacity is barred by the Eleventh Amendment. Defendants rely upon the Supreme Court decision in *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Prior to the *Edelman* decision, several courts had held that equitable relief, even monetary equitable relief, was not barred by the Eleventh Amendment. In *Edelman* the Supreme Court ruled that any monetary award, equitable or legal, which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. The Court also stated that the Eleventh Amendment would not bar a judgment which required state expenditure if the judgment was not an award in the form of compensation and the expense to the state was merely a "necessary consequence of compliance in the future with a substantial federal question determination." Specifically prohibited, however, were those cases where the judgment would require a retroactive restitution of payments improperly withheld. The back pay sought in this case is the type of money award which, under the *Edelman* decision, would clearly be precluded

by the Eleventh Amendment if it derived from the state treasury.

> The State of Kansas has provided in K.S.A. §72-8209:
>
> "Whenever any judgment rendered against any school district shall become final, the governing body thereof shall make a tax levy at the first tax levying period after such judgment becomes final, sufficient to pay such amount and such tax levy may be levied outside of tax levy limitations prescribed by law. . . ."

The Court views this statute as mandatory rather than permissive. A money judgment against the defendants in their official capacity would, in practical effect, be a judgment against the school district because the judgment would be paid by the school district. Under K.S.A. §72-8209, such a judgment would be paid by a special levy and not from the state treasury. The specific ruling in the *Edelman* decision would not, therefore, bar the monetary relief sought in this case. The *Edelman* decision does not, on the other hand, preclude a finding that an action is barred by the Eleventh Amendment, even though the relief sought would not be paid from the state treasury. The *Edelman* decision does not deal with the precise issue presented here.

Edelman is significant, however, because of the indication that monetary equitable relief should be treated the same, for purposes of the Eleventh Amendment, as a damage award. The Eleventh Amendment prohibition relates to "any suit in law or equity." Where money is sought, the same tests should be applied to determine whether the action is against the state regardless of whether the requested monetary relief is equitable or legal.

In *Harris v. Tooele County School District,* 471 F.2d 218 (10th Cir. 1973), the Tenth Circuit Court of Appeals

outlined standards for determining when a damage action against a school district is barred by the Eleventh Amendment. The core question is whether the action is against the state. The *Harris* decision looks to two factors. First, the decision indicates that a determination concerning whether an action against a given governmental entity is a suit against the state is made by reference to state law. The Court concluded that a school district was treated as an alter ego of the state under Utah law. This conclusion was reached on the basis of Utah case law which describes the school district as an instrument of the state, and extends the state's common law sovereign immunity to the Utah School District. The Court continued by stating:

> "Another test employed by federal courts to determine whether Eleventh Amendment immunity applies is the manner in which a political subdivision is financed. When it is apparent a judgment against a politiacl subdivision will ultimately reduce state funds, the action is in essence one for recovery of money from the state. 'The state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit.' "

Secondly, the Court notes that Utah school districts are financed by state and county funds and concludes there is a real possibility some of the judgment sought would be paid from the state funds. This possibility, the Court rules, is sufficient to bar the action on Eleventh Amendment grounds.

The analysis provided in the *Harris* decision compels the conclusion that the source of the money to pay the judgment is not the only factor examined to determine whether the action is against the state. Whether a given governmental entity is an alter ego of the state depends

upon the overall relationship between that entity and the state. This relationship is defined by state law.

Review of the relevant Kansas law reveals that Kansas school districts perform a state function and are generally controlled by the state. The Kansas Constitution imposes upon the legislature a duty to establish public schools. (Article 6, §1.) General supervision of the public schools is vested in the State Board of Education. (Article 6, §2.) Pursuant to these constitutional provisions, the state legislature has enacted extensive controls over the local school districts. See K.S.A. Chapter 72. A major portion of a school district's finances is contributed by the state. See K.S.A. §72-7001, et seq. School districts enjoy the state's common law sovereign immunity when engaged in governmental functions. See *Smith* v. *Board of Education,* 204 Kan. 580, 464 P.2d 571 (1970). The school district's relationship to the state is described by the Kansas Supreme Court in *Wichita Public School Employees Union* v. *Smith,* 194 Kan. 2, 379 P.2d 35 (1964).

> "A school district is an arm of the state existing only as a creature of the legislature to operate as a political subdivision of the state."

In view of the relationship between the Kansas School District and the State of Kansas, as indicated by state law, the Court finds that a Kansas school district is an alter ego of the state for purposes of the Eleventh Amendment. The fact that the state has chosen to pay a judgment against the school district by a tax on only specially interested citizens, does not alter the essential state character of the school district.

Plaintiffs insist Kansas has waived any Eleventh Amendment immunity for school districts by the enactment of K.S.A. §72-8408. That statute provides:

> "The board of education of any school district of this state securing insurance as hereinbefore authorized thereby waives its governmental immunity for any damage by reason of death or injury to person or property negligently caused by the acts of any officer, teacher or employee of such school district when acting within the scope of his authority or within the course of his employment. Such immunity shall be waived only to the extent of the insurance so obtained."

Defendants did secure insurance of the type described in the statute. Plaintiffs argue defendants thereby waived the school district's Eleventh Amendment immunity for the instant action.

Plaintiffs' argument fails to acknowledge the distinction between state common law sovereign immunity and Eleventh Amendment immunity. A state's waiver of immunity is presumed to be solely a waiver of the state's common law sovereign immunity and does not waive Eleventh Amendment immunity unless that waiver clearly indicates otherwise. See *Harris* v. *Tooele County School District*, supra; *Brennan* v. *University of Kansas*, 451 F.2d 1287 (10th Cir. 1971). Assuming the waiver effectuated by K.S.A. §72-8404 would waive immunity for damages awarded because of a due process violation, that waiver does not act as a waiver of Eleventh Amendment immunity.

Finding no waiver, the Court concludes the Eleventh Amendment would bar any monetary judgment against defendants in their official capacity. See *Williams* v. *Eaton*, 443 F.2d 422 (10th Cir. 1971). The Eleventh Amendment would not bar imposition of liability on the defendants individually. *Scheuer* v. *Rhodes*, 416 U.S. 323, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Nor would the Eleventh Amendment bar injunctive relief in the form of reinstatement. See *Williams* v. *Eaton*, supra; *Harkless* v. *Sweeny*

Ind. School District of Sweeny, Texas, 388 F.Supp. 738 (S.C.Tex. 1975).

PROPERTY OR LIBERTY INTEREST

Plaintiffs predicate their asserted right to a due process hearing primarily on the Supreme Court's decisions in *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 694, 33 L.Ed.2d 570 (1972); and *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Neither plaintiff enjoyed formal tenure. Formal tenure was available only to a teacher employed in a school district which included a city with a population of over 120,000 persons. See K.S.A. §72-5401, et seq. The *Roth* and *Sinderman* decisions indicate the lack of formal or contractual tenure does not foreclose the possibility that the teacher may have a liberty or property interest which cannot be taken without notice and a hearing.

A property interest is established when it is shown that the teacher had a clearly implied promise of continued employment. It must be more than a unilateral expectation—the teacher must have a legitimate claim of entitlement to it. *Board of Regents* v. *Roth*, supra; *Perry* v. *Sinderman*, supra. In the *Sinderman* decision, the property interest is compared with an implied contract or the common law of a particular industry which may supplement a collective bargaining agreement.

Plaintiffs rely upon the following factors to establish a constitutionally protected property interest: (1) the number of years each plaintiff had been employed as a teacher in U.S.D. No. 480, or its predecessor school district; (2) the school district's teacher evaluation procedures; (3) the contract provision whereby the Board agreed to follow the Fourteenth Amendment due process requirements; (4) the School Board policy for orderly termination of con-

tracts; (5) the School Board's general practice of renewing the contracts of satisfactory teachers; and (6) the Kansas continuing contract law, K.S.A. §72-5411. While several of these factors are, in the Court's opinion, irrelevant to plaintiffs' claim, certain of the factors do combine to establish a property interest.

Plaintiff Peters had taught in U.S.D. No. 80 and its predecessor school district for eleven continuous years. Plaintiff Epperson had taught in the school district for seventeen years, but had been non-renewed once several years prior to the non-renewal in question. She did not teach for several years and was rehired in 1967.

In *Johnson v. Fraley,* 470 F.2d 179 (4th Cir. 1972), the Court stated:

> "Continuous employment over a significant period of years . . . can amount to the equivalent of tenure."

The teacher in that case had been continuously employed in the same school for twenty-nine years. Although neither plaintiff in the instant action had been employed for that long, both had been employed for a significant period of years. If not sufficient standing alone, this factor is substantial support for plaintiffs' claim to a property interest in their teaching positions.

Plaintiffs also rely upon provisions found in a pamphlet entitled "School Board Policies." Defendants argue that these policies had not been formally adopted by the Board. The Court finds that these policies must be considered binding upon the Board for purposes of ascertaining whether a property right existed. These policies were distributed to the teachers without qualification as to their applicability. The principals of the schools where plaintiffs taught considered the policies to be in effect. In addition, the teachers' contracts referred to the Board policy hand-

book. The particular provisions in question, Chapter XI of the handbook, states that the policy shall become effective August 1, 1969. All relevant indicia indicated that the policies were in effect and for our purposes they must be considered to be so.

Chapter XI of the Board's policy handbook in evidence before the Court, is entitled "Orderly Procedure for Terminating Contract." Paragraphs A through D of this chapter outline procedures for evaluation of each teacher by the respective school principals. Copies of the evaluation were to be provided to the teacher and the teacher was to have an opportunity to respond in writing. For those teachers who were experiencing difficulty of a potentially serious nature, conferences were to be scheduled. Follow-up conferences were to be provided as needed to determine whether the problem was being solved. If progress was not satisfactory, the teacher was to be notified by February 15th if he would not be recommended for contract renewal. Paragraph E describes certain circumstances requiring immediate action. Those include physical or mental disability, refusal to abide by the terms of the contract, insubordination, incompetency, and acts considered unethical.

Paragraph F, upon which plaintiffs' contentions focus, provides as follows:

> "F. Action by the Board.
>
> The action of the board shall constitute a public record which is available for examination under conditions usually held as reasonable for examination of public records. *The teacher shall have a right to request a hearing with the board. If the teacher does not request a hearing with the board within two weeks from the date of notifica-*

tion, the right for a hearing will be forfeited." (Emphasis added.)

Defendants argue that Paragraph F applies only to termination of a contract during the contract period. While this contention is not without some appeal, it appears most reasonable to conclude that the Board policy makes no fine distinction between non-renewal and termination during the contract period. Under the single title, "Orderly Procedure For Terminating Contract," the policy treats both non-renewal and termination during the contract period. Paragraphs A through D clearly anticipate and are intended as an aid to decisions concerning non-renewal. Paragraph E relates primarily to termination during the contract period. The provision for a hearing is stated in a separate paragraph. It contains no reference to other provisions or qualification concerning when a hearing will be given except that it must be requested within two weeks after the date of notification. Although the only notice otherwise mentioned in the policy is notice that the principal will not recommend contract renewal, the notice referred to in the paragraph appears to be any notice of contract termination, including notice of non-renewal. The use of the language "terminating contract" to describe non-renewal is not unreasonable in view of the Kansas continuing contract law, K.S.A. §72-5411, which provides that all teacher contracts will continue in effect for the following year absent notice by March 15.

Teacher evaluation procedures were also outlined in each plaintiff's contract. The procedures found in the contracts differ from those found in the Board's policy handbook. It is not necessary here to determine which would control. The existence of such procedures constitutes an objective indication that the teacher will be re-

newed absent cause. This conclusion is supported by the language of the provisions in the Board's policy handbook. Paragraph C states:

> "If progress is not satisfactory, the staff member should know by February 15 if he will not be recommended for contract renewal."

It would be reasonable to assume from such a statement that renewal would be recommended if progress was satisfactory or if there were no serious problems in the first instance.

Perhaps more important, neither the procedures outlined in the contract, nor those specified in the Board's policy handbook, were followed in this case for either teacher. Where such procedures are in effect, a teacher has an objective expectancy of continued employment unless and until he or she is deprived of that expectancy in a manner consistent with the applicable procedures. See *Francis v. Ota*, 356 F.Supp. 1029 (D.Hawaii, 1973).

The Court is convinced that the combination of the above discussed factors operated to provide both plaintiffs with a clearly implied and objective expectancy of continued employment. The fact that plaintiffs were non-renewed because of an anticipated reduction of state aid does not alter this conclusion. From plaintiffs' viewpoint, this was an unusual and unexpected circumstance which does not affect plaintiffs' objective expectancy at the time they were non-renewed. Having found a constitutionally protected property interest, it is unnecessary to examine plaintiffs' asserted liberty interest. Plaintiffs were entitled to a hearing.

In addition to the asserted property interest, plaintiffs contend the Board's actions were arbitrary and capricious in that no factual basis existed for the decision not to

renew plaintiffs' contracts. This contention is effectively precluded by the evidence introduced and the jury's verdict in the trial on the First Amendment claims.

The evidence established that Superintendent Smalling recommended that plaintiffs' teaching contracts not be renewed. In so doing he advanced as reasons the reduction in student enrollment and loss of state aid. It was his opinion that a reduction in staff would, because it altered the student-teacher ratio, avoid some loss in state aid. The student-teacher ratio had increased because a reduction in student enrollment over the previous year had taken place. He recommended staff reduction at certain grade levels and in certain courses where, in his opinion, the reduction would have the least detrimental effect on the district's overall educational program. On the basis of evaluations made by the school principals, he expressed his opinion that plaintiffs were less competent than others in the course or grade level where the reduction was recommended. A similar conclusion was reached with regard to other teachers who are not parties to this action.

Under the Court's instructions, defendant Smalling was not protected by the same qualified immunity which was available to the school board members. It was the Court's opinion, based upon *Smith v. Losee,* 485 F.2d 334 (10th Cir. 1973); and *McLaughlin v. Tilendis,* 398 F.2d 289 (7th Cir. 1968), that the Superintendent's defense on the merits merged with his defense of qualified privilege. Therefore, the jury was instructed to return a verdict in favor of defendant Smalling if it found that his recommendation was "based on honest and/or true reasons." If the jury found that the reasons advanced by Smalling were known by him to be untrue, or partially untrue, and were advanced as a cover or pretext for retaliation

against plaintiffs because of their exercise of First Amendment rights, a verdict in favor of plaintiffs was required. These were the only two alternatives permitted by the evidence.

The Court instructed that the defendant Board members were protected by a qualified privilege. This privilege was explained in Instruction No. 13, as follows:

> "In order to be entitled to the qualified privilege defense, the board members must establish by a preponderance of the evidence that they acted in good faith. In the context of this case, good faith is established if the jury finds that the board members voted not to renew the plaintiffs' contracts based upon what they honestly believed to be good and valid reasons. Under such circumstances, the board members would have been entitled to rely upon the administrative expertise and advice of their school administrators, and they could not be held personally responsible for the damages suffered by the plaintiffs.
>
> "If, on the other hand, the jury should find that the board members knew that the reasons advanced for the non-renewal of plaintiffs' contracts were either untrue or merely being advanced as a pretext, and that the real reason for non-renewal was retaliation against the plaintiffs for exercising their First Amendment rights, yet they nevertheless voted for non-renewal, then they would not be entitled to the qualified privilege defense. Under these circumstances, the board members would not have acted in good faith, and their reliance upon the administrative expertise and advice of their school administrators would not shield them from liability for damages suffered by the plaintiffs."

The jury's verdict, which is binding upon the Court, as it was on the parties hereto, established that neither the Superintendent nor the Board members knew that the factual basis was incorrect and did not maliciously use these reasons as a pretext for violation of First Amendment rights. While there was some credible evidence suggesting that the factual basis advanced by Superintendent Smalling was incorrect, there was no indication that the defendants had not exercised due diligence in ascertaining the facts. Under these circumstances, the Court finds that the defendants did not act arbitrarily or capriciously.

AVAILABLE RELIEF

For the deprivation of property without due process, plaintiffs seek reinstatement, back pay, and expenses incurred while seeking other employment. As previously indicated, the Eleventh Amendment would bar any monetary award against the defendants in their official capacity. In their individual capacity a qualified immunity is available to each defendant. *Wood v. Strickland*, 43 U.S.L.W. 4293 (1975); *Bertot v. School District No. 1, Albany County, Wyoming*, No. 74-1030 (10th Cir. 7-16-75). In the *Strickland* decision, the available immunity is stated in the negative as follows:

> ". . . a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took would violate the constitutional rights of the student affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student."

This same immunity should apply to the instant action. The test expressed by the Supreme Court is rendered

applicable to this case by substituting the word "teacher" for student in the Supreme Court's statement.

Superintendent Smalling recommended that the Board provide plaintiffs with an opportunity for a hearing. It would be clearly improper to impose liability upon him for his action. His defense is a defense on the merits, not a qualified immunity defense. He committed no violation of plaintiffs' rights by his recommendation.

The qualified immunity available to the board members contains both subjective and objective elements. They are immune if they did not know or have reason to know their action would violate the teachers' rights and did not maliciously intend to violate the teachers' rights. When plaintiffs requested a hearing the defendant board members immediately sought counsel's advice. Counsel advised that no hearing was required. Therefore, it cannot be said that defendants knew, or should have known, their action would violate the teachers' rights. Defendants were acting in an area where, from their perspective at least, their legal obligation was unclear. They are not charged with predicting the future course of constitutional law. See *Wood v. Strickland*, supra.

The efforts of the board members in seeking legal advice is also substantial evidence that they did not maliciously intend to violate the teachers' rights. Upon advice of counsel the Board filed a declaratory judgment action to determine its obligation under state law and the teachers' contracts. The conduct of the Board convinces the Court that they did not act with malicious intent. Consequently, the Court finds that monetary relief should not be awarded against the defendant school board members individually.

In *Perry v. Sinderman*, supra, the Supreme Court found that the teacher was entitled to an opportunity to

prove he had a protected property interest. With reference to the appropriate remedy, the Court stated:

> "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his non-retention and challenge their sufficiency."

Reinstatement would be particularly inappropriate where, as here, there has been a judicial determination that the Board's reasons for the non-renewal were not constitutionally impermissible and the Board therefore had a right to non-renew the teachers. The requested reinstatement was denied.

Plaintiffs have not requested a hearing before the Board. A hearing would arguably serve a different function than the jury trial on the First Amendment question. At a hearing the Board would, after hearing plaintiffs' side of the issues, be faced with a decision concerning reinstatement. The fact that the Board could, without constitutional violation, refuse to renew plaintiffs' contracts, does not necessarily mean that they would do so. Plaintiffs' brief, moreover, indicates that plaintiffs feel a hearing would, at this point, be a futile gesture. The Court will not grant relief which is not requested and which, in fact, is specifically rejected.

In summary, the requested relief must be denied. Superintendent Smalling did not violate the teachers' rights. The Eleventh Amendment bars monetary relief against the defendant school board members in their official capacity. The defendant board members have established that they exercised good faith in their decision not to afford a hearing and they are, therefore, not personally liable for a

monetary award. Reinstatement is, under the circumstances, an inappropriate remedy and the teachers do not wish to be afforded a hearing which the passage of time, as well as known factual circumstances, realistically dictate an exercise in futility.

MOTION TO REMAND CASE NO. W-4819

Defendants move for reconsideration of the Court's previous order denying defendants' motion to remand Case No. W-4819, the declaratory judgment action. The previous motion to remand was denied on the grounds that the declaratory judgment action was, in effect, a defense to an anticipated action which would present a question of federal law. The Court now adheres to that ruling. However, because the Court has determined in the actions filed by the teachers that both teachers were entitled to a hearing, the declaratory judgment action is now moot.

This opinion shall constitute the Court's Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.

IT IS THEREFORE ORDERED in Cases No. W-4820 and W-4821 that judgment be, and it is hereby, entered in favor of the defendants.

IT IS FURTHER ORDERED in Case No. W-4819, that the same be dismissed as it is now moot.

At Wichita, Kansas, this 25th day of August, 1975.

/s/ Frank G. Theis
United States District Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

28 U.S.C. § 1331(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343(3):

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

Kansas Statutes Annotated, Chapter 72:

Section 5411:

> "All contracts of employment of teachers in the public schools in the state, shall continue in full force and effect during good behavior and efficient and competent service rendered by the teacher, and all such contracts of employment shall be deemed to continue for the next succeeding school year unless written notice of intention

to terminate the contract be served by the governing body upon any such teacher on or before the fifteenth day of March or the teacher shall give written notice to the governing body of the school district on or before the fifteenth day of April that the teacher does not desire continuation of said contract. Terms of a contract may be changed at any time by mutual consent of both the teacher and the governing body of the school district. [L. 1951, ch. 413, 2; L. 1970, ch. 284, § 13; July 1.]"

Section 5412:

"All contracts shall be binding on both the teacher and board of education of the school district until the teacher has been legally discharged from his teaching position or until released by the board of education from his contract. Until such teacher has been discharged or released, he shall not have authority to enter into a contract with the board of education of any school district for any period of time covered in the original contract. If upon written complaint, signed by two-thirds (2/3) of the members of the board of education of the school district, any teacher is reported to have entered into a contract with another school or board of education without having been released from his former contract, or for other reasons fails to fulfill the provisions of such contract, such teacher, upon being found guilty of said charge at a hearing held before the state board of education, shall have his certificate suspended for the remainder of the term for which said contract was made. Notwithstanding the foregoing

provisions of this section, any contract of employment made by the board of education of any school district prior to the public hearing on the budget of such school district shall be voidable in case adequate funds are not available in such budget for the compensation provided for in such contracts. [L. 1951, ch. 413, § 3; L. 1969, ch. 317, § 8; April 25.]"